

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN DUGAN, AURORA DUGAN, and  
MATTHEW TAPSCOTT, each individually  
and on behalf of all others similarly situated,

Plaintiffs,

v.

LLOYDS TSB BANK, PLC,

Defendant.

No. C 12-02549 WHA

No. C 12-02937 WHA

DAVID OSMENA and PATRICIA  
HOGAN-OSMENA, husband and wife,  
and on behalf of all others similarly situated,

Plaintiffs,

v.

LLOYDS TSB BANK, PLC,

Defendant.

**CASE MANAGEMENT ORDER  
AND REFERENCE TO  
MAGISTRATE JUDGE FOR  
MEDIATION/SETTLEMENT**

After a case management conference, the Court enters the following order pursuant to Rule 16 of the Federal Rules of Civil Procedure ("FRCP") and Civil Local Rule 16-10:

1. All initial disclosures under FRCP 26 must be completed by **SEPTEMBER 28, 2012**, on pain of preclusion under FRCP 37(c), including full and faithful compliance with FRCP 26(a)(1)(A)(iii).

- 1 2. Leave to add any new parties or pleading amendments must be sought by  
2 **NOVEMBER 30, 2012.**
- 3 3. The motion for class certification must be filed by **MARCH 7, 2013**, to be heard on a  
4 35-day track.
- 5 4. The non-expert discovery cut-off date shall be **OCTOBER 31, 2013.**
- 6 5. The last date for designation of expert testimony and disclosure of full expert reports  
7 under FRCP 26(a)(2) as to any issue on which a party has the burden of proof  
8 (“opening reports”) shall be **OCTOBER 31, 2013.** Within **FOURTEEN CALENDAR DAYS** of  
9 said deadline, all other parties must disclose any expert reports on the same issue  
10 (“opposition reports”). Within **SEVEN CALENDAR DAYS** thereafter, the party with the  
11 burden of proof must disclose any reply reports rebutting specific material in opposition  
12 reports. Reply reports must be limited to true rebuttal and should be very brief. They  
13 should not add new material that should have been placed in the opening report and the  
14 reply material will ordinarily be reserved for the rebuttal or sur-rebuttal phase of the  
15 trial. If the party with the burden of proof neglects to make a timely disclosure, the  
16 other side, if it wishes to put in expert evidence on the same issue anyway, must disclose  
17 its expert report within the fourteen-day period. In that event, the party with the burden  
18 of proof on the issue may then file a reply expert report within the seven-day period,  
19 subject to possible exclusion for “sandbagging” and, at all events, any such reply  
20 material may be presented at trial only after, if at all, the other side actually presents  
21 expert testimony to which the reply is responsive. The cutoff for all expert discovery  
22 shall be **FOURTEEN CALENDAR DAYS** after the deadline for reply reports. In aid of  
23 preparing an opposition or reply report, a responding party may depose the adverse  
24 expert sufficiently before the deadline for the opposition or reply report so as to use the  
25 testimony in preparing the response. Experts must make themselves readily available  
26 for such depositions. Alternatively, the responding party can elect to depose the expert  
27 later in the expert-discovery period. An expert, however, may be deposed only once  
28 unless the expert is used for different opening and/or opposition reports, in which case

1 the expert may be deposed independently on the subject matter of each report. At least  
2 **28 CALENDAR DAYS** before the due date for opening reports, each party shall serve a list  
3 of issues on which it will offer any expert testimony in its case-in-chief (including from  
4 non-retained experts). This is so that all parties will be timely able to obtain  
5 counter-experts on the listed issues and to facilitate the timely completeness of all expert  
6 reports. Failure to so disclose may result in preclusion.

7 6. As to damages studies, the cut-off date for *past damages* will be as of the expert report  
8 (or such earlier date as the expert may select). In addition, the experts may try to project  
9 *future damages* (*i.e.*, after the cut-off date) if the substantive standards for future  
10 damages can be met. With timely leave of Court or by written stipulation, the experts  
11 may update their reports (with supplemental reports) to a date closer to the time of trial.

12 7. At trial, the direct testimony of experts will be limited to the matters disclosed in their  
13 reports. Omitted material may not ordinarily be added on direct examination.

14 This means the reports must be complete and sufficiently detailed.

15 Illustrative animations, diagrams, charts and models may be used on direct examination  
16 only if they were part of the expert's report, with the exception of simple drawings and  
17 tabulations that plainly illustrate what is already in the report, which can be drawn by  
18 the witness at trial or otherwise shown to the jury. If cross-examination fairly opens the  
19 door, however, an expert may go beyond the written report on cross-examination and/or  
20 redirect examination. By written stipulation, of course, all sides may relax these  
21 requirements. For trial, an expert must learn and testify to the full amount of billing and  
22 unbilled time by him or his firm on the engagement.

23 8. To head off a recurring problem, experts lacking percipient knowledge should avoid  
24 vouching for the credibility of witnesses, *i.e.*, whose version of the facts in dispute is  
25 correct. This means that they may not, for example, testify that based upon a review of  
26 fact depositions and other material supplied by counsel, a police officer did (or did not)  
27 violate standards. Rather, the expert should be asked for his or her opinion based —  
28 explicitly — upon an assumed fact scenario. This will make clear that the witness is not

1 attempting to make credibility and fact findings and thereby to invade the province of  
2 the jury. Of course, a qualified expert can testify to relevant customs, usages, practices,  
3 recognized standards of conduct, and other specialized matters beyond the ken of a lay  
4 jury. This subject is addressed further in the trial guidelines referenced in paragraph 16  
5 below.

6 9. Counsel need not request a motion hearing date and may notice non-discovery motions  
7 for any Thursday (excepting holidays) at 8:00 a.m. The Court sometimes rules on the  
8 papers, issuing a written order and vacating the hearing. If a written request for oral  
9 argument is filed before a ruling, stating that a lawyer of four or fewer years out of law  
10 school will conduct the oral argument or at least the lion's share, then the Court will  
11 hear oral argument, believing that young lawyers need more opportunities for  
12 appearances than they usually receive. Discovery motions should be as per the  
13 supplemental order referenced in paragraph 16 and shall be expedited.

14 10. The last date to file dispositive motions shall be **DECEMBER 12, 2013**. No dispositive  
15 motions shall be heard more than 35 days *after* this deadline, *i.e.*, if any party waits until  
16 the last day to file, then the parties must adhere to the 35-day track in order to avoid  
17 pressure on the trial date.

18 11. The **FINAL PRETRIAL CONFERENCE** shall be at **2:00 P.M. on FEBRUARY 10, 2014**.  
19 Although the Court encourages argument and participation by younger attorneys, lead  
20 trial counsel must attend the final pretrial conference. For the form of submissions for  
21 the final pretrial conference and trial, please see paragraph 16 below.

22 12. A **JURY TRIAL** shall begin on **FEBRUARY 24, 2014**, at **7:30 A.M.**, in Courtroom 8,  
23 19th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102. The trial  
24 schedule and time limits shall be set at the final pretrial conference. Although almost all  
25 trials proceed on the date scheduled, it may be necessary on occasion for a case to trail,  
26 meaning the trial may commence a few days or even a few weeks after the date stated  
27 above, due to calendar congestion and the need to give priority to criminal trials.  
28 Counsel and the parties should plan accordingly, including advising witnesses.

- 1 13. Counsel may not stipulate around the foregoing dates without Court approval.
- 2 14. While the Court encourages the parties to engage in settlement discussions, please do  
3 not ask for any extensions on the ground of settlement discussions or on the ground that  
4 the parties experienced delays in scheduling settlement conferences, mediation or ENE.  
5 The parties should proceed to prepare their cases for trial. No continuance (even if  
6 stipulated) shall be granted on the ground of incomplete preparation without competent  
7 and detailed declarations setting forth good cause.
- 8 15. To avoid any misunderstanding with respect to the final pretrial conference and trial, the  
9 Court wishes to emphasize that all filings and appearances must be made — on pain of  
10 dismissal, default or other sanction — unless and until a dismissal fully resolving the  
11 case is received. It will not be enough to inform the clerk that a settlement in principle  
12 has been reached or to lodge a partially executed settlement agreement or to lodge a  
13 fully executed agreement (or dismissal) that resolves less than the entire case.  
14 Where, however, a fully-executed settlement agreement clearly and fully disposing of  
15 the entire case is lodged reasonably in advance of the pretrial conference or trial and  
16 only a ministerial act remains, the Court will arrange a telephone conference to work out  
17 an alternate procedure pending a formal dismissal.
- 18 16. If you have not already done so, please read and follow the “Supplemental Order to  
19 Order Setting Initial Case Management Conference in Civil Cases Before Judge William  
20 Alsup” and other orders issued by the Clerk’s office when this action was commenced.  
21 Among other things, the supplemental order explains when submissions are to go to the  
22 Clerk’s Office (the general rule) versus when submissions may go directly to chambers  
23 (rarely). With respect to the final pretrial conference and trial, please read and follow  
24 the “Guidelines For Trial and Final Pretrial Conference in Civil Jury Cases Before The  
25 Honorable William Alsup.” All orders and guidelines referenced in the paragraph are  
26 available on the district court’s website at <http://www.cand.uscourts.gov>. The website  
27 also includes other guidelines for attorney’s fees motions and the necessary form of  
28 attorney time records for cases before Judge Alsup. If you do not have access to the


Internet, you may contact Deputy Clerk Dawn K. Toland at (415) 522-2020 to learn how to pick up a hard copy.

17. All pretrial disclosures under FRCP 26(a)(3) and objections required by FRCP 26(a)(3) must be made on the schedule established by said rule.

18. This matter is hereby **REFERRED** to **MAGISTRATE JUDGE JOSEPH C. SPERO** for **MEDIATION/SETTLEMENT**.

**IT IS SO ORDERED.**

Dated: September 20, 2012.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE